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No. 648

In the Supreme Court of the United States

October Term, 1943.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

D. B. HELLARD.

BRIEF of RESPONDENT.

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INDEX.

PAGE

Statement 1
Statement of the case 3
Argument and authorities 6
Conclusion 25
Appendix A—Rule 10 of the Rules of Procedure in Probate Matters, adopted by the Supreme Court of Oklahoma in June, 1914 25

TABLE OF CASES.

Ashshalintubbi, In re, 178 Okl. 582, 63 P. (2d) 724 18
Board of Commissioners of Pawnee County v. United States, (C. C. A. 10) 139 F. (2d) 248 20
Bowling v. United States, 233 U. S. 528 15
Ceasar v. Burgess, (C. C. A. 10) 103 F. (2d) 503 . . . . . 9, 21
Choctaw Nation v. United States, 318 U. S. 423, 63 S. Ct. 672, 678, 87 L. ed. 877 22
Chupco v. Chapman, 76 Okl. 201, 170 Pac. 259, cert. den. 247 U. S. 506, 38 S. Ct. 427, 62 L. ed. 1240 6
Cowokochee v. Chapman, 90 Okl. 121, 215 Pac. 759, cert. den. 263 U. S. 713, 44 S. Ct. 132, 68 L. ed. 520 7
Erwin v. Hines, 190 Okl. 99, 121 P. (2d) 612 17
Hardridge v. Hardridge, 168 Okl. 7, 31 P. (2d) 597 11
Harris v. Bell, 254 U. S. 103, 41 S. Ct. 49, 65 L. ed. 159 . . 6, 7
Haymes v. McDermott, 125 Okl. 147, 256 Pac. 908 8
Heckman v. United States, 224 U. S. 413 15
Hoodenpyl v. Champion, 71 Okl. 270, 177 Pac. 369 7
Hy-tu-tse-mil-kin v. Smith, 194 U. S. 401, 24 S. Ct. 676, 48 L. ed. 1039 13-14
In re Fulsom's Estate, 141 Okl. 300, 285 Pac. 13 8
Joines v. Patterson, 274 U. S. 544, 549, 47 S. Ct. 706, 71 L. ed. 1194 9
Kappler, Indian Affairs, Laws and Treaties, Vol. 4, p. 179 3
Kiker v. United States, (C. C. A. 10) 63 F. (2d) 957 17
Lykins v. McGrath, 184 U. S. 169, 22 S. Ct. 450, 46 L. ed. 485 17

PAGE

McKay v. Kalyton, 204 U. S. 458, 27 S. Ct. 346, 51 L. ed. 566 11
Memo. Sol. I. D., September 21, 1935 9
Minnesota v. United States, 305 U. S. 382, 59 S. Ct. 292, 83 L. ed. 1345 ..... 9, 15, 20
Parker v. Richard, 250 U. S. 235, 39 S. Ct. 442, 63 L. ed. 954 ..... 7, 12
Pitman v. Commissioner of Internal Revenue, (C. C. A. 10) 64 F. (2d) 740 8
Privett v. United States, 256 U. S. 201 15
Reinhart v. Missouri-Kansas-Texas R. Co., 187 Okl. 661, 105 P. (2d) 541 23
Roberts v. Anderson, (C. C. A. 10) 66 F. (2d) 874 8
Salmon v. Johnson, 78 Okl. 182, 189 Pac. 537, cert. den. 254 U. S. 641, 41 S. Ct. 13, 65 L. ed. 452 ..... 7, 8, 16, 22
State, ex rel. Miller, v. Huser, 76 Okl. 130, 184 Pac. 113 8
Stewart v. Keys, 295 U. S. 403, 55 S. Ct. 807, 79 L. ed. 1507 ..... 6, 7
St. John v. Thompson, 179 Okl. 240, 65 P. (2d) 442, cert. den. 302 U. S. 718 11
Sunderland v. United States, 266 U. S. 226 15
Truskett v. Closser, 236 U. S. 223, 35 S. Ct. 385, 387, 59 L. ed. 549 23
United States v. Bond, (C. C. A. 10) 108 F. (2d) 504 ..... 8, 9, 11, 16, 20
United States v. Candalaria, 271 U. S. 432, 444, 46 S. Ct. 561, 70 L. ed. 1023 22
United States v. Gypsy Oil Co., (C. C. A. 8) 10 F. (2d) 487 ..... 11, 20
United States v. Lee, (C. C. A. 10) 108 F. (2d) 936 23
United States v. Watashe, (C. C. A. 10) 117 F. (2d) 947 8
Welch v. First Trust and Savings Bank, (C. C. A. 8) 15 F. (2d) 184 6
Winton v. Amos, 255 U. S. 373, 41 S. Ct. 342, 65 L. ed. 684 ..... 12, 13
Wolf v. Gills, 96 Okl. 6, 219 Pac. 350 7

Statutes.

	PAGE
Act of Congress of March 3, 1901, 25 U. S. C. A. 357	15
Act of Congress of April 26, 1906, 34 Stat. 137	6
Act of Congress of May 27, 1908, 35 Stat. 312	6
Act of Congress of June 25, 1910, 36 Stat. 855	11
Act of Congress of June 14, 1918, 40 Stat. 606	1, 11
Act of Congress of April 12, 1926, 44 Stat. 239	3, 5, 9
Act of Congress of May 10, 1928, 45 Stat. 495	4, 6
Act of Congress of March 3, 1928, 45 Stat. 161	11
Act of Congress of June 30, 1932, 47 Stat. 474 (25 U. S. C., Sec. 409a)	20
Act of Congress of January 27, 1933, 47 Stat. 777	8, 11, 18
Act of Congress of June 18, 1934, 48 Stat. 985	19, 20
Act of Congress of June 26, 1936, 49 Stat. 1967	20
Act of Congress of December 24, 1942, 56 Stat. 1080	11
5 F. C. A., Title 25, Secs. 355 and 375	3
Okl. Stat. Ann., Title 12, Sec. 1509	17
Okl. Stat. Ann., Title 12, Secs. 1512-1513	17
58 Okl. Stat. Ann., Sec. 735	11

Text Books and Miscellaneous.

Cohen, Handbook of Federal Indian Law (1942), p. 119	12
Cohen, Handbook of Federal Indian Law (1942), p. 446	9
Cohen, Handbook of Federal Indian Law (1942), pp. 379 (footnote 178) and 446	16
Rule 10, Rules of Procedure in Probate Matters, by Supreme Court of Oklahoma	18
S. Rep. No. 330, 65th Congress, 2nd Sess.	8, 16

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1943.

No. 648

UNITED STATES OF AMERICA, *Petitioner,*

vs.

D. B. HELLARD.

BRIEF *of* RESPONDENT.

The Government presents but one question for determination in this case, that is, whether or not the United States is a necessary and indispensable party to an action instituted in the courts of the State of Oklahoma, pursuant to the provisions of Section 2 of the Act of Congress of June 14, 1918, 40 Stat. 606, for the partition of lands acquired by inheritance by full-blood members of the Five Civilized Tribes.(1)

In order to more clearly present the issues, and for convenience, we preface our further statement of the case by setting forth in full the Act of Congress of June 14, 1918, as follows:

"An Act to provide for a determination of heirship in cases of deceased members of the Cherokee,

(1) It has never been so contended until the present case.

Chickasaw, Choctaw, Creek and Seminole Tribes of Indians in Oklahoma, conferring jurisdiction upon District Court to partition lands belonging to full-blood heirs of allottees of the Five Civilized Tribes, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: *Provided,* That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: *Provided further,* That where the time limited by the laws of said state for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed as to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws: *Provided further,* That said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving nonresident defendants in civil suits in the District Court of said state; and if any person so served by publication does

not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing.

"*Sec. 2.* That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."

This Act is found in Volume 4, Kappler, Indian Affairs, Laws and Treaties, at page 179. Section 1 is also found in 5 F. C. A., Title 25, Section 375; and Section 2 is found in the same volume under Title 25, Section 355.

Statement of the Case.

This action was instituted in the District Court of Creek County, Oklahoma, by the respondent, plaintiff below, to quiet title to lands comprising the allotment of Polly Charcotetenna, deceased; the title to which was acquired by him pursuant to a judgment entered in the same court ordering and directing the partition and sale of such lands (R. 3-7).

Notice of the pendency of the action was given to the Superintendent of the Five Civilized Tribes in the manner provided by Section 3 of the Act of Congress of April 12, 1926, 44 Stat. 239 (R. 7); and the cause was removed by the Government to the United States District Court for the Northern District of Oklahoma, in the manner provided by such Act of Congress (R. 9-11).

The Government filed a petition of intervention in the case after removal, in which it contended, in substance (R. 13-15), that the District Court of Creek County, Oklahoma, was without jurisdiction to order and direct the partition and sale of the lands involved herein, for the asserted reasons: *(1)* Because of the absence of the United States as a necessary and indispensable party; and *(2)* because notice of the pendency of the action was not given to the Superintendent of the Five Civilized Tribes pursuant to the provisions of the Act of Congress of April 12, 1926.

The case was submitted to the trial court upon an agreed statement of fact, the material part of which discloses (R. 16-18):

The lands in question were allotted to Polly Charcotetenna, a full-blood member of the Creek or Muskogee Tribe of Indians, as her distributive share of the lands of such tribe; and they were duly selected by her as tax-exempt under the provisions of the Act of Congress of May 10, 1928, 45 Stat. 495.

The allottee died intestate on January 5, 1938, leaving surviving as her heirs, a son, John Hay; a grand-son, Anderson Allen, and a great grand-daughter, Ethleene Fulsom, now Bevenue. John Hay thereafter died intestate, leaving surviving as his heirs, Sakotah Hay, his widow; Deshalecoweney Hay, a son; Modie Hay, a son; Eva Barnett, *nee* Hay, a daughter; and Lofa Hay, a son. The heirs of both decedents were full-blood Creek Indians.

On April 20, 1940, an action was instituted in the District Court of Creek County, Oklahoma, by Ethleene Fulsom, now Bevehue, Deshalecowenen Hay, Modie Hay, Eva Barnett, *nee* Hay, and Lofa Hay, as plaintiffs, against Anderson Allen and Sakotah Hay, as defendants, seeking the

partition of these lands. On June 24, 1940, and after service of process duly had upon the defendants, a judgment was entered in said cause ordering and directing the partition and sale of the lands; and pursuant to this judgment the lands were later sold to the plaintiff, D. B. Hellard, by the sheriff of Creek County, Oklahoma. The sale was confirmed by the court, and no appeal was had therefrom, and a sheriff's deed in partition was duly issued to the plaintiff.

It was also agreed that the partition proceedings were conducted in strict conformity to the statutes of the State of Oklahoma providing for the partition of real estate; but the United States was not named a party defendant in such action, and it was not served with process, and notice of the pendency of the action was not given to the Superintendent of the Five Civilized Tribes as authorized by the Act of Congress of April 12, 1926, 44 Stat. 239 (R. 18).

The trial court made findings of fact conforming to the agreed statement of fact, and entered its conclusions of law, in which it was concluded, in substance (R. 19-24), that the United States was not a necessary party to the partition action in the state court, and that service of notice in the manner authorized by the Act of Congress of April 12, 1926, was not a prerequisite to the jurisdiction of such court to order and direct the partition and sale of the lands. A formal decree was entered in the cause quieting the plaintiff's title to such lands (R. 25).

The Circuit Court affirmed (R. 31; 138 F. (2d) 985).

ARGUMENT and AUTHORITIES.

The Act of May 27, 1908, 35 Stat. 312, was a revising statute, and was intended as a substitute for all former acts relating to restrictions upon the alienation of allotted and inherited Indian lands of members of the Five Civilized Tribes, and operated to repeal all previous congressional enactments and treaty provisions in conflict therewith upon the same subject. *Stewart* v. *Keyes,* 295 U. S. 403, 55 S. Ct. 807, 79 L. ed. 1507; *Welch* v. *First Trust and Savings Bank,* (C. C. A. 8) 15 F. (2d) 184; *Chupco* v. *Chapman,* 76 Okl. 201, 170 Pac. 259, *certiorari* denied 247 U. S. 506, 38 S. Ct. 427, 62 L. ed. 1240. The act dealt with restrictions relating to lands of living allottees separately from those relating to inherited lands.(2)

Section 1 of the Act applies exclusively to the lands of living allottees. It freed from restrictions all lands of mixed-blood allottees having less than one-half Indian blood, and all lands, except homestead, of mixed-blood allottees having half or more than half and less than three-quarters Indian blood. The original restrictions were continued on other allotted lands until April 26, 1931. These restrictions were extended for an additional period of twenty-five years by Section 1 of the Act of May 10, 1928, 45 Stat. 495.

By the provisions of Section 9 of the 1908 Act, the death of the allottee operated to remove all restrictions upon the alienation of allotted lands, except that qualified restric-

(2) Congress, in dealing with the Five Civilized Tribes, has consistently imposed different restrictions upon the alienation of lands by those to whom the lands were allotted while they were living, than upon the heirs of such allottees. Secs. 19, 22, Act of Congress of April 26, 1906, 34 Stat. 137; Secs. 1, 9, Act of May 27, 1908, 35 Stat. 312. See also, Harris v. Bell, 254 U. S. 103, 41 S. Ct. 49, 65 L. ed. 159.

tions were continued as to the full-blood heir, so as to require the approval of the conveyance of such heir by the proper county court of the State of Oklahoma. *Parker* v. *Richard,* 250 U. S. 235, 39 S. Ct. 442, 63 L. ed. 954; *Harris* v. *Bell,* 254 U. S. 103, 41 S. Ct. 49, 65 L. ed. 159; *Stewart* v. *Keyes,* 295 U. S. 403, 55 S. Ct. 807, 79 L. ed. 1507. By the amendment of April 12, 1926, 44 Stat. 239, the qualified restrictions were extended so as to embrace the interest in lands acquired from an allottee, by a full-blood devisee.

The 1908 Act made no provision for the determination of the heirship of deceased allottees, and made no provision authorizing full-blood heirs to make a division among themselves of lands inherited in common by them. The courts were, therefore, without jurisdiction to enter a binding decree determining the heirship of deceased allottees in so far as restricted lands were concerned. *Wolf* v. *Gills,* 96 Okl. 6, 219 Pac. 350; *Cowokochee* v. *Chapman,* 90 Okl. 121, 215 Pac. 759, *certiorari* denied 263 U. S. 713, 44 S. Ct. 132, 68 L. ed. 520. The courts were likewise without jurisdiction to order and direct the partition of lands, where any interest was acquired by inheritance by full-blood members of these tribes. *Hoodenpyl* v. *Champion,* 71 Okl. 270, 177 Pac. 369; *Salmon* v. *Johnson,* 78 Okl. 182, 189 Pac. 537, *certiorari* denied 254 U. S. 641, 41 S. Ct. 13, 65 L. ed. 452.

The obvious purpose of Congress in the enactment of Section 1 of the 1918 Act was to vest the courts of the State of Oklahoma with jurisdiction to determine the heirship of the allottee, in order that the full-blood Indian heir might convey a merchantable title to his inherited lands, and thus receive for them a sum commensurate with the value of the lands.

And its plain purpose in the enactment of Section 2 of

the act was to vest the courts of the State of Oklahoma with jurisdiction to order and direct the partition of lands inherited by full-blood heirs, in order that the heirs might put an end to the tenancy in common in lands inherited by them, so as to vest in each heir the title to, and the use in severalty of, some definite part of the property so owned in common, so that each heir might enjoy and improve his separate estate without let or hindrance from the other heirs, or their grantees.(3)

The 1918 Act has received the consideration of the courts in numerous cases and it is definitely settled that Section 1 of the Act vests the courts of the State of Oklahoma with jurisdiction to conclusively settle and determine the heirship of deceased allottees of the Five Civilized Tribes. *State, ex rel. Miller,* v. *Huser,* 76 Okl. 130, 184 Pac. 113; *In re Fulsom's Estate,* 141 Okl. 300, 285 Pac. 13; *Pitman* v. *Commissioner of Internal Revenue,* (C. C. A. 10) 64 F. (2d) 740; *Roberts* v. *Anderson,* (C. C. A. 10) 66 F. (2d) 874.

It is likewise definitely settled that Section 2 of the Act vests the courts of the state with jurisdiction to entertain an action for the partition of lands acquired by inheritance or devise by restricted members of these tribes. *Salmon* v. *Johnson,* 78 Okl. 182, 189 Pac. 537, *certiorari* denied 254 U. S. 641, 41 S. Ct. 13, 65 L. ed. 452; *Haymes* v. *McDermott,* 125 Okl. 147, 256 Pac. 908; *United States* v. *Bond,* (C. C. A. 10) 108 F. (2d) 504; *United States* v. *Watashe,* (C. C. A. 10) 117 F. (2d) 947. It is also settled that the Act of January 27, 1933, 47 Stat. 777, does not narrow that part of the 1918 Act which consents to the making of the lands of full-blood members of the Five Civilized Tribes subject to

(3) See: S. Rep. No. 330, 65th Congress, 2nd Sess.

the laws of the State of Oklahoma relating to the partition of real estate. *United States* v. *Bond, supra.*(4)

We respectfully assert that the language of the involved act is plain and unambiguous, and it is evident that Congress not only intended to vest the courts of the State of Oklahoma with jurisdiction to entertain such proceeding, but as well to adopt, as laws of the United States, the statutes of the state defining necessary parties, the requisites of pleadings, the form of process, and manner for service thereof, as well as all other statutory provisions of the state necessarily involved in the commencement, trial, and conclusion of an action for partition of real estate.(5)

It will be observed that this act made no provision for making the United States a party to such proceeding, and that no other act of Congress then in force made such provision. It is evident that Congress did not intend that the United States become a party to such proceeding—otherwise, it must be held that the act in question was wholly without force and effect until the effective date of Section 3 of the Act of April 12, 1926, 44 Stat. 239,(6) for it is well settled that the United States cannot be made a party to any proceeding without congressional consent. *State of Minnesota* v. *United States,* 305 U. S. 382, 59 S. Ct. 292, 83 L. ed. 1345. A consideration of the history of the Government's dealings

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(4) Accord: Cohen, Handbook of Federal Indian Law (1942), p. 446; Memo. Sol. I. D., September 21, 1935.

(5) In Joines v. Patterson, 274 U. S. 544, 549, 47 S. Ct. 706, 71 L. ed. 1194, it is held: "When extended over Indian Territory, the specified laws of Arkansas carried the settled constructions placed upon them by courts of that state. So construed, they became, in effect, laws of the United States as though originally enacted by Congress for government of that territory."

(6) The provisions of Section 3 of the 1906 Act, authorizing the giving of notice to the Superintendent of the Five Civilized Tribes of the pendency of an action, are neither directory nor mandatory—they are permissive only. It was so held in Ceasar v. Burgess, (C. C. A. 10), 103 F. (2d) 503.

with the Five Civilized Tribes, as shown by the respective congressional enactments relating to their property and affairs, discloses that Congress has, in many instances, delegated power and authority to the courts of the state to administer the affairs and property of restricted members of these tribes. Among these provisions, are: *(a)* Section 6 of the Act of May 27, 1908, *supra,* which confers jurisdiction upon the County Courts of the state to administer the property and affairs of minor members of these tribes; *(b)* Section 8 of the Act of May 27, 1908, *supra,* amending Section 23 of the Act of April 26, 1906, 34 Stat. 137, which vests the judges of the county courts of the state with power to acknowledge and approve wills of full-blood Indians, and makes such approval a condition to the validity of such will in certain instances; *(c)* Section 9 of the Act of Congress of May 27, 1908, *supra,* as amended by Section 1 of the Act of April 12, 1926, *supra,* conferring jurisdiction upon the county courts to approve conveyances made by full-blood heirs and devisees; and *(d)* Section 1 of the 1918 Act, *supra,* which confers jurisdiction upon the county courts of the state to determine the heirship of deceased restricted members of these tribes. A consideration of these respective enactments is important in the determination of the construction to be placed upon the involved enactment if there be any ambiguity in the language of the act, or any doubt as to the meaning to be ascribed to its terms, for if the United States is a necessary party to an action brought under Section 2 of this Act for the partition of lands inherited by full-blood heirs, it is likewise a necessary party to any proceeding authorized by the statutory provisions above cited.

These respective statutes have received the consideration of both the state and federal courts in numerous cases,

and it has never been indicated or suggested that the United States is a necessary party to any proceeding authorized thereby.(7)

The petitioner concedes that the United States is not a necessary party to a proceeding for the approval of a conveyance by a full-blood heir, or to proceedings for determination of heirship (Br., pp. 13-17).(8) In an endeavor to distinguish between the power conferred by the respective statutes, *supra*, petitioner says that the county courts are "well qualified to perform the same paternalistic role formerly exercised by the Secretary of the Interior," while "the state district court is a trial court of general jurisdiction poorly suited to the paternalistic role of guardian,"(9) and for

(7) It was expressly held in United States v. Gypsy Oil Co., (C. C. A. 8) 10 F. (2d) 487, that the Secretary is not vested with supervision of the proceeds of lands inherited by full-blood heirs.

(8) Petitioner erroneously says (brief, p. 15), that no governmental interest is directly involved in proceedings to determine heirship, "inasmuch as the restrictions on alienation do not prevent inheritance."

The government has a direct interest in such proceedings, since the judgment rendered directly affects the right of possession, and the title to restricted land. It is interested in seeing that the land be held, during the period of restrictions, for the sole use and benefit of allottees, and their lawful heirs. McKay v. Kalyton, 204 U. S. 458, 27 S. Ct. 346, 51 L. ed. 566. This has been recognized by Congress. See, Act of June 25, 1910, 36 Stat. 855, as amended by Act of March 3, 1928, 45 Stat. 161; and Act of December 24, 1942, 56 Stat. 1080, vesting the Secretary with exclusive jurisdiction to determine heirs. Congress has made many appropriations to cover expense of such determination.

It also erroneously says (brief, p. 15) that restricted property of the deceased Indian is not within the jurisdiction of the probate court. While restricted property is not subject to administration in the courts of the state, and is not subject to the payment of debts, yet, the judgment entered pursuant to Section 1 of the 1918 Act conclusively determines the title to and the right of possession of inherited lands. Hardridge v. Hardridge, 168 Okl. 7, 31 P. (2d) 597; St. John v. Thompson, 179 Okl. 240, 65 P. (2d) 442, *certiorari* denied 302 U. S. 718.

(9) Congress has not so determined. It has vested the District and County Courts of the state with identical power. The involved act confers power on the County Court, as well as the District Court, to partition inherited land. United States v. Bond, (C. C. A. 10), 108 F. (2d) 504. Section 1 of the 1918 Act vests the District Courts with power to determine heirship on appeal from the County Court, and the state statutes provide for a trial *de novo* in such appeals. 58 Okl. St. Ann., Sec. 735. See also, Section 8 of the Act of January 27, 1933, 47 Stat. 777, which authorizes an appeal to the District Court from an order approving conveyance of full-blood heir.

this reason, they assert, the United States is a necessary party to partition proceedings.

In dealing with Indian questions, it must be remembered that the power of Congress is plenary and political, and that it alone has authority to determine the time and manner of imposing, extending, or removing restrictions upon the lands of the Indian wards of the Nation. It was within the constitutional power of Congress to vest the courts of the state with jurisdiction to order and direct the partition and sale of lands inherited by restricted members of the Five Civilized Tribes. *Parker* v. *Richard*, 250 U. S. 235, 39 S. Ct. 442, 63 L. ed. 954,(10) and it was also within its power to prescribe the procedure to be followed, and to determine whether or not the United States should be made a party thereto. *Winton* v. *Amos*, 255 U. S. 373, 41 S. Ct. 342, 65 L. ed. 684.

We respectfully assert that a consideration of the act in question clearly demonstrates that it was the intention of Congress that the proceeding authorized by the act should be maintained without the government being made a party thereto.

In *Winton* v. *Amos*, *supra*, it was contended that the Government's trusteeship of the funds of Mississippi Choc-

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(10) Cohen, Handbook of Federal Indian Law (1942), p. 119, is authority for the following statement:

"In Oklahoma there has been a particularly broad devolution of powers to the state government. The organs of state government, however, in exercising such powers have been considered federal agencies. Thus, in Parker v. Richard, the Supreme Court in referring to the authority of the County Courts of Oklahoma under Section 9 of the Act of May 27, 1908, said:

" * * * That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency; and this is recognized by the Supreme Court of the state. Marcy v. Board of Commissioners, 45 Okl. 1."

taw Indians, and its guardianship over their allotted lands, made it necessary that the United States be made a party to proceedings instituted in the Court of Claims, under congressional authority, by the attorneys who had successfully advanced the claim of these Indians to membership in the Choctaw Nation.

The act, under which the proceedings were brought, authorized the Court of Claims to hear and determine the claims of the attorneys for services rendered and expenses incurred in behalf of the Indians and to render judgment in such amount as appeared to be equitable and just. It provided that the "judgment, if any, shall be paid from any funds now or hereafter due such Choctaws by the United States." It also provided that notice of such suit should be given to the Governor of the Choctaw Nation, and that the Attorney General should appear and defend the suit in behalf of the Indians.

In answering the contention that the United States was a necessary party to the proceedings, the court held (255 U. S. 392):

> "To the objection that the Government's trusteeship of the funds of these Indians and its guardianship over their interest in the allotted lands made it necessary that the United States should be a party to the proceedings, it is sufficient to say that the regulation of this matter is clearly within the power of Congress, and that Congress acted within that power in constituting the Governor of the Choctaw Nation the representative of the defendants upon whom notice of the suit was to be served in their behalf, and designating the Attorney General of the United States as their attorney to appear and defend the suit. * * *"

And, in *Hy-tu-tse-mil-kin* v. *Smith*, 194 U. S. 401, 24

S. Ct. 676, 48 L. ed. 1039, it was contended that the United States was a necessary party to an action for an allotment under the provisions of the Act of Congress August 15, 1894, 28 Stat. 290, which vested the Circuit Courts of the United States with jurisdiction to try and determine any action, suit or proceeding, arising in their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to an allotment of land under any law or treaty; and which act provided that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him."

In answering this contention, the court held (24 S. Ct. 680):

> "In our opinion, the claim that the United States must be made a party is without foundation.
>
> * * * * * * * *
>
> "Under this statute there is no provision rendering it necessary, in a private litigation between two claimants for an allotment, to make the United States a party. The statute itself provides that the judgment or decree of the court, upon being properly certified to the Secretary of the Interior, is to have the same effect as if the allotment had been allowed and approved by the Secretary of the Interior. This provision assumes that an action may be maintained without the Government being made a party, and provides for the filing of a certificate of the judgment and its effect; and the Government hereby, in substance and effect, consents to be bound by the judgment, and to issue a patent in accordance therewith. * * *"

These cited cases are directly applicable and controlling in the case at bar, and afford a full answer to the peti-

tioner's contention that it was a necessary party to the partition proceedings had in this case under authority of the 1918 Act.

The petitioner asserts that the decision below conflicts with *Minnesota* v. *United States*, 305 U. S. 382, 59 S. Ct. 292, 83 L. ed. 236.(11)

The *Minnesota* case involved, in substance, the following facts:

An action was instituted by the State of Minnesota in one of its courts to condemn for highway purposes certain lands, the title to which was held by the United States, in trust, for restricted Indian allottees.

The state claimed the right to maintain such action by reason of the provisions of the Act of Congress of March 3, 1901 (25 U. S. C. A. 357), which provides:

> "That lands allotted in severalty may be condemned for any public purposes under the laws of the state or territory where located, in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

The case was removed to Federal Court by the attorney for the United States.

It was contended by the Government that the state court in the first instance, and the federal court upon removal, did not acquire jurisdiction of the condemnation proceedings, because such jurisdiction had not been specifically conferred by Congress, and because the United States was a necessary and indispensable party to the proceedings.

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(11) The government also relies upon Heckman v. United States, 224 U. S. 413; Bowling v. United States, 233 U. S. 528; Privett v. United States, 256 U. S. 201, and Sunderland v. United States, 266 U. S. 226, to sustain its position in this case. These cases are not in point. They merely hold that the United States has capacity to sue to set aside conveyances of land allotted to Indians under its care, where restrictions upon alienation have been transgressed.

In passing upon this contention, this Court held, in substances: *(1)* that the state court did not have jurisdiction of the condemnation proceedings for the reason that the language "in the manner as land owned in fee may be condemned" did not authorize a suit in the state court, but merely authorized condemnation "for any public purpose under the laws of the state or territory where located"; and, *(2)* that the United States was a necessary party to such an action, *(a)* because it held the fee title to the lands in trust for the Indian owners; *(b)* because it was interested in the amount to be paid for the lands; and, *(c)* because it was interested in the disposition of the proceeds to be derived from the condemnation of the lands, since Congress had conferred authority upon the Secretary of the Interior to reinvest such funds in the purchase of other lands in behalf of the Indian owners.

We respectfully urge that the decision in the *Minnesota* case is clearly distinguishable from the present case, and has no persuasive effect in the construction of the involved enactment, for the reasons, as follows:

(1) The 1918 Act, unlike the statute involved in the *Minnesota* case, specifically confers jurisdiction upon the state courts to remove restrictions upon land acquired by full-blood Indians by inheritance or devise by the sale of such lands in partition. *Salmon* v. *Johnson*, 78 Okl. 182, 189 Pac. 537; *United States* v. *Bond* (C. C. A. 10), 108 F. (2d) 504.[12]

(2) The 1918 Act, unlike the enactment involved in the *Minnesota* case, adopts the statutes of the State of Oklahoma providing for appraisement and sale of lands where parti-

(12) Cf.: S. Rep. No. 330, 65th Congress, 2nd Session; Cohen, Handbook of Federal Indian Law (1942), pp. 379 (footnote 178) and 446.

tion in kind cannot be had, to define the procedure to be followed in the sale in partition of lands inherited by full-blood members of these tribes.

It must be assumed that Congress was cognizant with these statutory provisions, and knew that the right to partition was absolute *(Erwin* v. *Hines,* 190 Okl. 99, 121 P. (2d) 612). It also knew that partition in kind would be made whenever possible without manifest injury to the parties, but in the event partition in kind could not be made, the land would be appraised by commissioners appointed by the court (Title 12, Okla. Stat. Ann. 1509); and in the event no party elected to take at the appraised value, or in the event more than one elected to take at such value, the lands would be sold at sheriff's sale to the highest bidder, and that such sale could not be made for less than two-thirds of the appraised value (Title 12, Okla. Stat. Ann. 1512-1513).

It must be conceded that it was within the plenary power of Congress to determine what safe-guards, if any, would be provided for the protection of the full-blood heir. And by the adoption of these provisions, it provided a safe-guard for the protection of the Indian similar to that provided by the first proviso of Section 9 of the Act of May 27, 1908, which requires the conveyance of a full-blood heir to be approved by the appropriate county court of the state. The sole purpose of this requirement is to see that the Indian shall not be wronged by any sale he might desire to make; that the consideration which be receives is ample; and, that he shall, in fact, receive it. *Lykins* v. *McGrath,* 184 U. S. 169, 22 S. Ct. 450, 46 L. ed. 485; *Kiker* v. *United States,* (C. C. A. 10) 63 F. (2d) 957.

(3) The Secretary of the Interior was granted supervision of the funds to be derived from the proceedings involved in the *Minnesota* case, while no such provision has

been made by Congress for such supervision of the proceeds to be derived from the sale of inherited and devised lands of full-blood members of the Five Civilized Tribes, either under the 1918 Act, or under any other enactment relating to these tribes.

As we have heretofore shown, the proviso of Section 9 of the 1908 Act relaxed restrictions, so as to permit the full-blood heir to convey, and required approval by the appropriate county court for the sole purpose of safe-guarding his interests; and the purpose of the amendatory Act of April 12, 1926, was to provide the same safe-guards in behalf of full-blood devisees. This provision was further amended by Section 8 of the Act of January 27, 1933, 47 Stat. 777, to require the approval of such conveyances to be made in open court, in the manner provided by the rules promulgated by the Supreme Court of the State of Oklahoma, in June, 1914, governing procedure in probate matters.

Rule 10 of the probate rules,[13] in addition to defining the procedure for obtaining such approval, provides as follows:

> "When it shall appear for the best interest of the Indian, approval will be withheld unless the grantor agrees, in writing, for the deposit of the proceeds derived from the sale of the land to be expended, subject to the approval of the County Court."

This is the first expression of Congress placing any restriction upon the custody or supervision of funds to be derived from the sale of lands acquired by inheritance or devise by full-blood members of these tribes; and it negatives any claims that either the Secretary of the Interior,

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(13) Rule 10 is set forth in full in In re Ashshalintubbi, 178 Okl. 582, 63 P. (2d) 724. For convenience it is set forth in an appendix to this brief.

or the Superintendent of the Five Civilized Tribes, was entitled to the custody and control of the proceeds to be derived from the sale of such lands. It constitutes an affirmative recognition by Congress that the proceeds of such sales had not theretofore been restricted in any manner.

In addition, the 1918 Act provides that any land allotted in partition proceedings to a full-blood Indian, or conveyed to him upon an election to take at the appraised value, shall remain subject to all restrictions upon alienation obtaining prior to such partition. These restrictions are the same restrictions as are provided by Section 9 of the 1908 Act, as amended by the Act of April 12, 1926; and, following partition, the heir or devisee could sell the lands apportioned to him, or acquired upon election to take at the appraised value, with the approval of the appropriate county court.

We respectfully assert that since Congress made provision for continuing restrictions upon the lands in the event they were allotted to the full-blood Indian by partition in kind, or acquired by him upon an election to take at the appraised value, and at the same time made no provision for restricting the proceeds to be derived by him in case the land was sold, that it did not intend that the proceeds from such sale should be subject to any restriction whatsoever.(14)

It is significant to note that the decision in the *Minnesota* case, holding the proceeds to be derived from the sale of the lands in the condemnation proceedings therein involved, to be restricted, was based upon the fact that the restrictions upon the alienation of such lands, and the proceeds to be derived therefrom, were extended by the Indian Reorganization Act of June 18, 1934, 48 Stat. 984.

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(14) Cf.: Cohen, Handbook of Federal Indian Law (1942), page 446.

In this connection, we call attention to the fact that the Five Civilized Tribes were expressly exempted from the operation of that act; and the Oklahoma Welfare Act of June 26, 1936, 49 Stat. 1967 (5 F. C. A., Title 25, Section 451, *et seq.)*, contains no such provision.

It is also significant to note that the decision in the *Minnesota* case was entered on January 3, 1939, and the decision of the Circuit Court for the Tenth Circuit in *United States* v. *Bond*, 108 F. (2d) 504, *supra*, was not entered until December 26, 1939, and yet the Government made no effort in the latter case to apply the rule announced in the *Minnesota* case to the partition proceedings which formed the basis of that case.

The petitioner asserts (Br., p. 8) that the United States was interested in the partition proceedings "in effectuating the authority of the Secretary of the Interior under the Act of June 30, 1932, 47 Stat. 474 (25 U. S. C., Sec. 409a),(15)

(15) The act does not, expressly or by implication, impose restrictions upon the proceeds of partition sales. It merely authorizes the Secretary to invest the proceeds derived from the sale of restricted, tax-exempt land "in other lands selected by the Indian." The Secretary may make the purchase, at the Indian's request, even though the proceeds are not restricted. See Sec. 5, Act of June 18, 1934, 48 Stat. 985 (25 F. C. A., Sec. 465), and Sec. 1, Act of June 26, 1936, 49 Stat. 1967 (25 F. C. A., Sec. 501), which authorizes the Secretary to acquire lands for Indians by purchase, relinquishment, gift, exchange or assignment. Cf.: Board Com'rs Pawnee County, Pawnee County, v. United States, (C. C. A. 10) 139 F. (2d) 248.

The 1932 Act provides that the land so purchased "shall be restricted * * * and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable land from which the reinvested proceeds were derived, * * *." It is evident that such purchased land could be conveyed by the Indian, with the approval of the County Court. It could also be partitioned under the act in question.

If such act applies to proceeds derived from partition, it would also apply to the proceeds of a voluntary alienation under the provisions of Section 9 of the 1908 Act, as amended by the 1926 and 1933 statutes. That Congress did not so intend is shown by the language of Rule 10, *supra*, which vests the County Court with supervision and control of such funds. This negatives any control on the part of the Secretary. Cf.: United States v. Gypsy Oil Co., (C. C. A. 8) 10[illegible] (2d) 487, holding the proceeds of such lands to be free from the Secretary's control.

to determine that the proceeds shall be reinvested in other lands correspondingly tax-exempt and restricted," and "in making it possible for the Secretary of the Interior to exercise his preferential right to purchase the land at the sale, under the Act of June 26, 1936, Sec. 2, 49 Stat. 1967."

It must be presumed that Congress was cognizant with the provisions of the 1918 Act when it adopted the later acts, and if it had intended that the Secretary be given notice of the pendency of the partition proceedings, it would have so provided in these acts. Neither of the acts, relied upon by petitioner, contains any express revocation of the power conferred by the 1918 Act, nor any provision inconsistent with its continued exercise by the state courts. Had there been a purpose to modify or alter the terms of the 1918 Act, it is but reasonable to believe that words applicably expressing that purpose would have been used. The matter would not have been left to conjecture or uncertain implication.

The petitioner also contends that the decision below should be reversed for the reason, in substance, that while it is now the customary practice to give notice of the pendency of partition proceedings in the manner provided by Section 3 of the Act of Congress of April 12, 1926, yet, that litigants will not continue to follow this practice if this decision is permitted to stand.

It is to be observed that the language of Section 3 of the 1926 Act, authorizing the service of such a notice, is neither directory nor mandatory. It is merely permissive, and it was so held by the Circuit Court for the Tenth Circuit in *Ceasar* v. *Burgess,* 103 F. (2d) 503. It is for Congress alone to determine whether or not notice of such proceedings should be given to the United States, and this Court should not rewrite the 1926 Act, or expand its clear terms to meet

the objection of petitioner. Cf. *Choctaw Nation* v. *United States,* 318 U. S. 423, 63 S. Ct. 672, 678, 87 L. ed. 877.

We respectfully assert that the District Court of Creek County, Oklahoma, was vested with jurisdiction of the partition proceedings which form the basis of this action, and that it was authorized to proceed to judgment and decree, without the service of any notice upon the United States, subject only to the right of the United States to relitigate the issues, if the judgment rendered in its absence was erroneous as a matter of fact or of law. *United States* v. *Candalaria,* 271 U. S. 432, 444, 46 S. Ct. 561, 70 L. ed. 1023.

The Government, however, conceded that these partition proceedings were conducted in strict conformity with the statutes of the state (R. 18). It does not here attempt to relitigate the issues, but confines its assault upon such proceedings solely to its contention that the state court was without jurisdiction in the premises.

As we have heretofore shown, the act in question has received the consideration of the courts in many cases, and it has never been indicated or suggested, until the present case, that the United States was a necessary party to such proceedings.

We call attention to the fact that the decision of the Supreme Court of Oklahoma in *Salmon* v. *Johnson,* 78 Okl. 182, 189 Pac. 537, was entered on April 26, 1920. It was therein expressly held that the purpose of the act was to confer jurisdiction on the courts of the State of Oklahoma to partition inherited lands of full-blood members of these tribes.

The rule announced in that case has been followed without departure by the federal courts, as well as by the courts

of the State of Oklahoma. It has governed the transfers of real estate for nearly a quarter of a century, and become a rule of property. This construction should not be overturned, even though such construction were open to doubt. *Truskett* v. *Closser,* 236 U. S. 223, 35 S. Ct. 385, 387, 59 L. ed. 549; *United States* v. *Lee,* (C. C. A. 10) 108 F. (2d) 936.

The petitioner seeks to avoid the force of the last cited cases by its statement, in substance, that no substantial number of titles will be affected by the decision in this case.

This statement is based, in part, upon the claim that the applicable statute of limitations of the State of Oklahoma, made available by Section 2 of the 1926 Act, affords an absolute bar to any attack upon partition proceedings had prior to the effective date of the Act of April 12, 1926, (Br., p. 5).

A consideration of the decisions of the Supreme Court of the state, construing the applicable statute of limitations (12 Okla. Stat. Ann., Sec. 93), clearly shows that they fail to sustain petitioner's claim. The statute of limitations is not set in motion by the entry of the decree in partition, or by the recording of the sheriff's deed. It is available as a defense only where the land has been held under adverse possession for 15 years, and title has thus been acquired by prescription. In order for possession to be adverse, within the meaning of the statute, it must be open, visible, continuous, exclusive, and of such a nature as will notify persons seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but against all titles or claims; and proof of such possession must be established by clear and positive proof. *Reinhart* v. *Missouri-Kansas-Texas R. Co.,* 187 Okl. 661, 105 P. (2d) 541.

It is apparent that a consideration of the statute of limitations lends no aid in determining the number of titles which will be affected by the decision in this case. This is especially true, since a large part of that portion of Eastern Oklahoma, which comprises the lands of the Five Civilized Tribes, consists of open and unoccupied land. The bar of the statute of limitations is not available to one claiming land of that class through partition proceedings, irrespective of the time which has elapsed since the date of such proceedings.

The petitioner's estimate of the number of titles which will be affected by the judgment in this case, is also based, in part, upon the report of the Superintendent of the Five Civilized Tribes, showing the number of notices which have been served on him, under authority of the 1926 Act.

In this connection, we call attention to the fact, that although few notices were served upon the Superintendent prior to the year 1933, yet that since that time, it has been the customary practice of careful lawyers to serve the Superintendent with notice of the pendency of all actions and proceedings to which an Indian is a party, whether or not any question of restrictions is involved. It has also been the customary practice for the United States to remove to the federal court, all actions where notice is served, and where the rights of a restricted Indian is involved. A more accurate estimate could be obtained by a consideration of the number of cases removed to federal court, than can be had by a consideration of the report of the Superintendent of the Five Civilized Tribes.

Conclusion.

We respectfully assert that the District Court of Creek County, Oklahoma, was vested with jurisdiction to order and direct the partition and sale of the lands which form the basis of this case, without the Government being made a party to such proceedings; and that the decision of the Honorable Circuit Court of Appeals for the Tenth Circuit, in so holding, should be in all matters approved and affirmed.

Respectfully submitted,

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Sapulpa, Oklahoma,
Counsel for Respondent.

APPENDIX A.

Rule 10 of the Rules of Procedure in Probate Matters, adopted by the Supreme Court of Oklahoma, in June, 1914, is as follows:

"Deeds conveying inherited lands of full-blood Indian heirs shall be approved only on the verified petitions of grantors which shall set forth the names of the parties, description of the land, roll number of the decedent and grantors and quantum of blood, the permanent residence of the deceased allottee at the time of death, and the character and extent of the interest sold. Said petitions shall be set down for hearing not less than ten (10) days from the date of filing and on one of the two days hereinbefore provided for the confirmation of sale by guardian, advertised in the county where the land is located for one week, and probate attorney or local counsel for the tribe of which the grant-

or is a member shall be notified upon the filing of the petition. Said land shall be appraised, and testimony of disinterested parties may be required as to the value of the land conveyed, when deemed necessary by the Court. The grantors shall be present, and be examined in open court and before such deeds shall be approved, and the Court must be satisfied that the consideration has been paid in full in the presence of the Court. No petition will be considered when any deed has been previously placed of record upon the land, or taken within thirty (30) days after the death of the allottee. The evidence shall be transcribed by the stenographer and filed of record, in the case, the expense of which, including attorney's fees, must be borne by the grantee. When it shall appear for the best interest of the Indian, approval will be withheld unless the grantor agrees in writing for the deposit of the proceeds derived from the sale of the land, to be expended subject to the approval of the County Court."

SUPREME COURT OF THE UNITED STATES.

No. 648.—October Term, 1943.

The United States of America, Petitioner, *vs.* D. B. Hellard.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[May 15, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

The question in this case is whether full-blood Indians of the Five Civilized Tribes may be divested of title to restricted land by a sale in partition proceedings to which the United States is not a party.

A full-blood Creek Indian died leaving heirs of the full blood. They inherited certain lands from her, lands which were subject to restrictions on alienation both in her hands and in the hands of the heirs.[1] By § 2 of the Act of June 14, 1918 (25 U. S. C. § 355, 40 Stat. 606) Congress declared that such lands were "made subject to the laws of the State of Oklahoma, providing for the partition of real estate."[2] By § 3 of the Act of April 12, 1926 (44 Stat. 239) Congress provided for the service upon the Superintendent for the Five Civilized Tribes of a prescribed, written

[1] 35 Stat. 312; 44 Stat. 239; 45 Stat. 495; 47 Stat. 777. And see Parker v. Richard, 250 U. S. 235; Harris v. Bell, 254 U. S. 103; Stewart v. Keyes, 295 U. S. 403.

[2] "That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character."

Sec. 1 of this Act (25 U. S. C. § 375) provides in part: "That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question."

notice of the pendency of any suit to which a restricted member of the Tribes in Oklahoma or the restricted heirs or grantees are parties and which involves claims to "lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same." By that Act the United States is given an opportunity to appear in the cause and is bound by the judgment which is entered.

The heirs instituted partition proceedings in the District Court for Creek County, Oklahoma in March 1940. The United States was not named as a party nor was notice of the suit served on the Superintendent. A judgment of partition was entered, pursuant to which the land was sold and a sheriff's deed in partition issued to respondent. In 1941 respondent instituted in the same court the present action against the Indian heirs to quiet his title. Notice was served on the Superintendent. The heirs answered disclaiming any interest. At the instance of the United States the cause was removed to the federal District Court as authorized by § 3 of the Act of April 12, 1926. The United States then answered, alleging that the partition proceedings were void for lack of the United States as a party and for want of service on the Superintendent under § 3 of the Act of April 12, 1926. It prayed that the deed in partition be set aside and title quieted in the heirs. The District Court held that the partition proceedings were valid and quieted title in respondent. The Circuit Court of Appeals affirmed. 138 F. 2d 985. The case is here on a petition for a writ of certiorari which we granted because of the importance in the administration of Indian affairs of the question presented.

It seems clear from the language of the Act of June 14, 1918 and its legislative history (S. Rep. No. 330, 65th Cong., 2d Sess.) that Congress vested in the Oklahoma state courts jurisdiction to determine heirship in these restricted lands (§1) and jurisdiction to partition them. § 2. See *Salmon* v. *Johnson*, 78 Okl. 182; *United States* v. *Bond*, 108 F. 2d 504. The authority of Congress to select state tribunals to perform such functions is clear. *Parker* v. *Richard*, 250 U. S. 235; *Harris* v. *Bell*, 254 U. S. 103; *Stewart* v. *Keyes*, 295 U. S. 403. But a grant of jurisdiction to a particular court without more does not determine what parties are indispensable to the proceedings in question. Petitioner concedes that

the United States is not a necessary party to proceedings to determine heirship under § 1 of the Act of June 14, 1918. Since restrictions on alienation do not prevent inheritance, no governmental interest is at least directly involved in such a determination. It may likewise be inferred from the language, nature, and purpose of Acts of Congress which vest jurisdiction over specified Indian affairs in a designated court that Congress not only has made that tribunal the exclusive agency to effectuate the federal policy but also has dispensed with any requirement that the United States be a party to the proceedings. See *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, 413-414; *Winton* v. *Amos*, 255 U. S. 373, 392. But we do not think that Congress did more by those provisions of the Act of June 14, 1918 with which we are presently concerned than to grant the Oklahoma state courts jurisdiction over partition proceedings.

Restricted Indian land is property in which the United States has an interest. "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust." *Heckman* v. *United States*, 224 U. S. 413, 437. Though the Indian's interest is alienated by judicial decree, the United States may sue to cancel the judgment and set the conveyance aside where it was not a party to the action. *Bowling & Miami Investment Co.* v. *United States*, 233 U. S. 528; *Privett* v. *United States*, 256 U. S. 201; *Sunderland* v. *United States*, 266 U. S. 226. Under § 2 of the Act of June 14, 1918 lands partitioned in kind to full-bloods remain restricted. Only if the land is sold at partition sale are the restrictions removed. The governmental interest throughout the partition proceedings is as clear as it would be if the fee were in the United States. *Minnesota* v. *United States*, 305 U. S. 382, 387-388; *Town of Okemah* v. *United States*, 140 F. 2d 963. The United States as guardian of the Indians is necessarily interested either in obtaining partition in kind where that course conforms to its policy of preserving restricted land for the Indians or in seeing that the best possible price is obtained where a sale is desirable. Where, as here, the lands are both tax-exempt and restricted, the United States is concerned with the reinvestment of the proceeds in other lands likewise tax-exempt and restricted as provided in the Act

of June 30, 1932, 47 Stat. 474, 25 U. S. C. § 409a.[3] The United States is also interested in protecting the preferential right of the Secretary of the Interior to purchase the land at the sale for another Indian as provided in § 2 of the Act of June 26, 1936, 49 Stat. 1967.[4] These are important governmental interests. Since the power of Congress over Indian affairs is plenary, it may waive or withdraw these duties of guardianship or entrust them to such agency—state or federal—as it chooses. But we do not find any indication that when Congress came to deal with these partition proceedings it substituted the Oklahoma state court for the Secretary of the Interior in the performance of the functions which we have enumerated. That alone would not be fatal to respondent's position if it could be inferred that those governmental interests were to be protected by means other than making the United States a party. But, as we have said, the Act in question purports to be no more than a jurisdictional statute. It fails to say that the United States is not a necessary party; nor does it suggest that the United States or its officers are confined to a limited role in the proceedings. Cf. *United States* v. *Candelaria*, 271 U. S. 432, 444. We must read the Act in light of the history of restricted lands. That history shows that the United States has long been considered a necessary party to such proceedings in view of the large governmental interests which are at stake. We will not infer from a mere grant of jurisdiction to a state or federal court to adjudicate claims to restricted lands and to order

[3] "That whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance."

[4] "Whenever any restricted Indian land or interests in land, other than sales or leases of oil, gas, or other minerals therein, are offered for sale, pursuant to the terms of this or any other Act of Congress, the Secretary of the Interior shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians of the same or any other tribe, at a fair valuation to be fixed by the appraisement satisfactory to the Indian owner or owners, or if offered for sale at auction said Secretary shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians by meeting the highest bid otherwise offered therefor."

their sale or other distribution that Congress dispensed with that long-standing requirement. The purpose to effectuate such a major change in policy must be clear.

Much stress is laid on the point that if § 2 of the Act of June 14, 1918 is so construed, it was meaningless until the Act of April 12, 1926 was passed which provided a statutory method for making the United States a party. The argument is that prior to the latter Act there was no way of joining the United States as a party to such an action. But as stated by Mr. Justice Brandeis speaking for the Court in *Minnesota* v. *United States*, *supra*, p. 388, authorization to bring an action involving restricted lands "confers by implication permission to sue the United States."[5] The suit in that case failed because no jurisdiction was granted to the state courts to condemn the lands in question.[6] But since the state court in the present case was given jurisdiction to partition, consent to be sued in the state court may be implied. Service of process therefore might be had in the usual way (see *Town of Okemah* v. *United States*, *supra*, p. 966) even in absence of the 1926 Act.

Reversed.

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[5] And see United States v. Jones, 109 U. S. 513, 519-521.

[6] See Cohen, Handbook of Federal Indian Law (1942), p. 381.